IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JENNIFER MCCOMB, Administratrix of the Estate of STANLEY MULLIGAN and in her own right and on behalf of the heirs of the Estate of STANLEY MULLIGAN	:	
	:	**CIVIL ACTION**
v.	:	
	:	**No. 01-1570**
NEUMANN MEDICAL CENTER, TEMPLE UNIVERSITY HOSPITAL, SAIED ALEMO, M.D., ALEMO NEUROLOGICAL & NEUROSURGICAL ASSOCIATES, P.C., Dr. MARTIN PASQUALONE, M.D. and DR. RICHARD KANOFF	:	

MEMORANDUM ORDER

Plaintiff has asserted medical malpractice, survival and wrongful death claims arising from the treatment and death of her decedent at Neumann Medical Center in January 1999 after a fall. The action was initiated in the Philadelphia Common Pleas Court in January 2001 by a writ of summons. The complaint was filed and served in March 2001. Defendants Neumann Medical Center, Temple University Hospital and Pasqualone effected the removal of the action to this court several weeks later.[1]

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[1]All defendants who have been served must join in a removal petition. See Balazik v. County of Dauphin, 44 F.3d 209, 213 (3d Cir. 1995); Roe v. O'Donohue, 38 F.3d 298, 301 (7th Cir. 1994); Doe v. Kerwood, 969 F.2d 165, 168 (5th Cir. 1992); Landman v. Borough of Bristol, 896 F. Supp. 406, 309 (E.D. Pa. 1995); Ogletree v. Barnes, 851 F. Supp. 184, 186-87 (E.D. Pa. 1994); McManus v. Glassman's Wynnefield, Inc., 710 F. Supp. 1043, 1045 (E.D. Pa. 1989); Collins v. American Red Cross, 724 F. Supp. 353, 359 (E.D. Pa. 1989). It is not altogether clear whether or when defendants Alemo and Alemo Associates were served. It is clear, however, that defendant Kanoff entered an appearance prior to removal.

Employing an obsolete procedure, defense counsel filed a Petition for Removal with a "request that this civil action be removed from Philadelphia County to the United States District Court." The Clerk understandably treated the petition as a notice of removal and the case was removed. The asserted basis for removal was original federal question jurisdiction under 28 U.S.C. § 1331.[2] Taking her lead from defendants, plaintiff filed a Response to the Petition for Removal asking the court to "refuse to allow removal of this civil action." In this pleading, plaintiff objects to removal and contends there is no federal jurisdiction. The import of the pleading is clear and it will be treated as a motion to remand for lack of subject matter jurisdiction.[3]

Plaintiff alleges thirty-two acts and omissions which constitute negligence or deviation from accepted standards of medical care in support of her medical malpractice claim. Among these are two allegations that defendants failed to comport with

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[2]Defense counsel also notes in the petition that "the amount in controversy exclusive of interest and costs is in excess of $100,000." There is, however, no allegation regarding the citizenship of any party and it clearly appears that there is not complete diversity of citizenship.

[3]Of course, federal courts also have an obligation to ensure that they have subject matter jurisdiction and to decide the issue sua sponte. See Liberty Mut. Ins. Co. v. Ward Trucking Corp., 48 F.3d 742, 750 (3d Cir. 1995); American Policyholders Ins. V. Nyacol Products, 989 F.2d 1256, 1258 (1st Cir. 1993). Procedural defects, on the other hand, are waived if not timely asserted within thirty days of removal. Plaintiff has not timely objected to the failure of all defendants to join in the removal and this defect is thus waived.

standards for providing emergency medical care in the Emergency Medical Treatment and Active Labor Act (EMTALA), part of the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA). See Baber v. Hospital Corp. of America, 977 F.2d 872, 873 n.1 (4th Cir. 1994). The removing defendants seize upon those factual allegations to assert federal jurisdiction.

The existence of federal question jurisdiction generally requires the presentation of a federal question on the face of a plaintiff's well-pleaded complaint. See Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). As the party seeking to establish jurisdiction, a removing defendant bears the burden of showing the presence of a federal question. Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990). The removal statute is "strictly construed against removal and all doubts should be resolved in favor of remand." Id. (quoting Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987)).

Plaintiff has clearly asserted only claims for medical malpractice, survival and wrongful death. These claims all arise under state, and not federal, law. The resolution of none of these claims "necessarily depends on resolution of a substantial question of federal law." Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983). See also Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 810 (1988) (when a state claim is supported by alternate theories,

federal law must be essential to every theory to create federal question jurisdiction).

A reference to standards set forth in EMTALA to support a state law negligence claim also predicated on numerous other alleged acts and omissions does not confer federal question jurisdiction. See Howery v. Allstate Ins. Co., 243 F.3d 912, 917-19 (5th Cir. 2001) (holding allegations of violations of federal Fair Credit Reporting Act among other alleged abuses in support of state deceptive practices claim did not give rise to federal question jurisdiction and vacating judgment entered in district court for lack of jurisdiction); Rains v. Criterion Sys., Inc., 80 F.3d 339, 345-46 & n.7 (9th Cir. 1996)(holding plaintiff's reference to requirements of Title VII in support of state wrongful termination claim does not confer federal question jurisdiction and vacating district court judgment sua sponte for lack of jurisdiction); Mulcahey v. Columbia Organic Chems. Co., Inc., 29 F.3d 148, 153-54 (4th Cir. 1994) (plaintiff's reference to federal environmental statutes among other theories to show negligence per se in connection with state tort claim does not support federal question jurisdiction).

The mere fact that federal courts have subject matter jurisdiction to adjudicate EMTALA claims is irrelevant as plaintiff has chosen not to plead a claim under EMTALA. A plaintiff may avoid federal jurisdiction by exclusive reliance on state law. See Krashna v. Oliver Realty, Inc., 895 F.2d 111, 113

(3d Cir. 1990); Wuerl v. International Life Science Church, 758 F. Supp. 1084, 1086 (W.D. Pa. 1991) (plaintiff can prevent removal by bringing only state claims although he could have asserted federal claims on same facts); 14B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3721 (3d ed. 1998).[4]

The court concludes that it does not have subject matter jurisdiction in this action and removal was improper.

ACCORDINGLY, this day of July, 2001, pursuant to 28 U.S.C. § 1447(c), **IT IS HEREBY ORDERED** that the above action is **REMANDED** forthwith to the Court of Common Pleas of Philadelphia.

BY THE COURT:

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JAY C. WALDMAN, J.

[4]Defendant does not suggest that plaintiff's claims are preempted by EMTALA and, in any event, EMTALA does not preempt state medical malpractice law. See Bryan v. Rectors & Visitors of Univ. of Va., 95 F.3d 349, 351-52 (4th Cir. 1996); Evitt v. University Heights Hosp., 727 F. Supp. 495, 497-98 (S.D. Ind. 1989). See also Eberhardt v. City of Los Angeles, 62 F.3d 1253, 1258 (9th Cir. 1995).